No. 72-782

Supreme Court of the United States

October Term, 1973

GATEWAY COAL COMPANY,
Petitioner

v.

UNITED MINE WORKERS OF AMERICA; DISTRICT No. 4, UNITED MINE WORKERS OF AMERICA; LOCAL No. 6330, UNITED MINE WORKERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF FREDERICK McALLISTER, CLAUDE WORKE, CARL ELLIS, JAMES RICH, JEROME SCOTT, WINFIELD CREECH, GEORGE McHUGH, RONALD DEMCHYA, and RONALD CASMIERSHI, TO APPEAR AMICI CURIAE ON BEHALF OF RESPONDENT

and

BRIEF FOR FREDERICK McALLISTER, et al., IN SUPPORT OF MOTION TO APPEAR AMICI CURIAE ON BEHALF OF RESPONDENT

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Now come the above-named Petitioners and request leave to appear, *amici curiae*, on behalf of Respondents for the following reasons:

1. Petitioners are employees of the Chrysler Corporation at its Detroit Forge Plant.

2. Petitioners, as industrial workers, believe that they, and perhaps thousands of other workers, will be affected by this Honorable Court's decision herein.

3. Petitioners believe that there is room for individual workers to be heard before this Honorable Court.

4. Petitioners have recently been invidiously affected

by the misapplication of this Honorable Court's decision in *Boys Market* v. *Clerk's Union*, 398 U.S. 235 (1970), by the lower courts.

5. Petitioners file this motion belatedly because they have only recently, August 12, 1973, been adversely affected, as stated *supra*.

WHEREFORE, petitioners request that the leave applied for be granted.

Respectfully submitted,

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September 26, 1973

No. 72-782

Supreme Court of the United States

October Term, 1973

GATEWAY COAL COMPANY,
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v.

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DISTRICT No. 4, UNITED MINE WORKERS OF AMERICA;
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STATEMENT OF INTEREST

Petitioners are employees of the Chrysler Corporation at Chrysler's Detroit Forge Plant. On August 7, 1973 they participated in a work stoppage at the Forge Plant protesting abnormally dangerous working conditions. During an inspection of the Forge Plant, Douglas Fraser, International Union Vice-President of UAW, called the Detroit Forge Plant one of the two most unsafe Forge Plants he had ever seen. Open wires, water leaks, greasy floors and machinery, and unsafe machinery were common place throughout the Detroit Forge Plant. Many of the petitioners had suffered severe, and often disabling, injuries prior to August 7, 1973.

The work stoppage which occurred on August 7, 1973, was precipitated by an injury to Antonio McJennett on August 5, 1973 at approximately 5:30 p.m. He lost two fingers on his right hand when a crane went out of control.

After the work stoppage on August 7, 1973 an injunction was issued by the Michigan Circuit Court on August 8, 1973, enjoining petitioners from refusing to work even though conditions in the plants were abnormally unsafe. The law suit was removed to the United States District Court for the Eastern District of Michigan, and a preliminary injunction was issued by the District Judge on August 12, 1973.

This preliminary injunction was based on *Boys Markets* v. *Clerk's Union*, 398 U.S. 235 (1970), and represents a severe inroad into the statutory scheme of the Labor Management Relations Act, Section 502, 29 U.S.C. 143.

Petitioners believe that they, and perhaps thousands of other workers, will be affected by this Honorable Court's decision in the present matter. They believe that the decision of the Court of Appeals in this case was correct. This

Honorable Court's decision in the *Boys Market* case is not applicaple where workers withhold their services to protest "abnormally dangerous" conditions of work.

ARGUMENT

I. THE BOYS MARKET CASE IS NOT APPLICABLE TO THE GATEWAY SITUATION.

Amici curiae, as workers who withheld their service from the Chrysler Corporation because of good faith belief in abnormally dangerous working conditions, have felt the invidious effect of the misapplication of this Honorable Court's decision in *Boys Market* v. *Retail Clerks, supra,* by the lower courts.

The *Boys Market* doctrine, an exception to Section 4 of the Norris-La Guardia Act, 29 USC §104, is not applicable to the present situation. *Boys Market* is not applicable to §502 (29 USC 143) safety strikes. Under *Boys Market,*

> "A District Court entertaining an action under §301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-La Guardia Act."

In order for the company herein to obtain an injunction, in the face of §4 of Norris-La Guardia, plaintiff must show:

1. That the labor dispute is covered by the no-strike clause, *and*
2. That the defendants are contractually bound to arbitrate the dispute in question.

These two elements are the necessary preconditions to the Court granting an injunction in this matter. *Boys Market, supra* at page 254; *Associated General Contractors* v. *Teamsters* (7th. Cir., 1972), 454 F. 2d. 1324, 79 LRRM 2555, at page 2558.

It is our contention that Plaintiffs as a matter of law and fact cannot prove either element in the instant case.

First, safety strikes under §502 of the Labor-Management Relations Act cannot, as a matter of law, be proscribed by no-strike clauses in collective bargaining agreements. The right to strike over "abnormally dangerous" working conditions cannot be bargained away because the right belongs to each worker and above the collective bargaining agreement.

The Court below recognized this fact and correctly found *Boys Market* inapplicable (see 466 F. 2d. 1157 Fn. 1):

> "*Men are not want to submit matters of life and death to arbitration and no enlightened society encourages, much less requires, them to do so.* If employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment, *there is no sound reason for requiring them to subordinate their judgment to that of an arbitrator,* however impartial he may be. The arbitrator is not staking his life in his impartial decision. It should not be the policy of the law to force the employees to stake theirs in his judgment." (Emphasis added.)

Second, as the Court below noted, 80 LRRM at 3154, the contract herein "neither particularly stated nor unambiguously agreed" that the parties would submit mine safety disputes to arbitration, "and the practice of the parties had been to the contrary." Under *Boys Market,* no injunction may be issued unless the parties are contractually bound to arbitrate the dispute in question.

Thus, even assuming *per arguendo* that §502 does not apply, no injunction should issue herein under *Boys Market.* The condition precedent for injunctive relief, agreement to arbitrate, does not exist.

In *Boys Market,* this Honorable Court specifically said:

> *"We do not undermine the vitality of the Norris-La Guardia Act."* (Emphasis added.)

Yet, application of *Boys Market* to the present situation, or to any situation involving a §502 strike, *does* undermine the vitality of the Norris-La Guardia Act.

Section 502 operates to remove strikes protesting abnormally dangerous working conditions from the ambit of contractual no-strike agreements, *as a matter of law.*

Under *Boys Market,* strike injunctions can only issue in:

> "... the situation in which a collective bargaining contract contains a mandatory grievance adjustment or arbitration procedure."

Otherwise, the Norris-La Guardia Act must be applied. Here, as in all §502 strikes, the issues are not mandatory arbitration issues, since they are outside of the no-strike prohibition. By applying *Boys Market* in these situations, the Norris-La Guardia Act *is* undermined.

II. A SAFETY STRIKE, PROTECTED BY SECTION 502 OF THE NLRA, IS OUTSIDE THE COVERAGE OF THE EMPLOYER'S NO-STRIKE PROVISION.

Section 502 reads:

> "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; *nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the*

> *place of employment of such employee or employees be deemed a strike under this Act.''*

This provision was interpreted to exclude any safety strike from the no-strike provision:

> Moreover, it was not error for the Board to decide that under these circumstances it was immaterial that the bargaining contract contained a no-strike clause. Since Section 502 provides that walking out under a good faith belief of abnormally dangerous conditions does not constitute a strike, the no-strike provision was not applicable.
>
> • • • • • • • • • •
>
> That section expressly limits the right of management to require continuance of work under what the employees in good faith believe to be ''abnormally dangerous'' conditions.
>
> *NLRB* v. *Knight Morley Corp.*, 251 F. 2d 752 (CA 6 1957) Cert. denied 357 US (1958)

Section 502 provides an absolute protection for a work stoppage protesting ''abnormally dangerous conditions,'' such as the condition herein. As the Court of Appeals below said, a safety dispute is *''sui generis''*. Under the very language of Section 502, such a work stoppage can never be construed to violate a contractual no-strike provision, since Section 502 states that such a work stoppage shall not be deemed ''a strike under this Act''.

Employees are protected under a ''safety strike'' even if they fail to first make a demand on the employer.

> We cannot agree that employees necessarily lose their right to engage in concerted activities under Section 7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable.

NLRB v. *Washington Aluminum Co.*, 370 U.S. 2 (1962)

In fact, in the *Washington Aluminum* case, the employees were protesting the cold conditions in the plant; this Honorable Court stated the actions were protected "whether they take place before, after, or at the same time such a demand is made."

The no-strike provisions of collective bargaining agreements cannot abrogate presently existing statutes and the protection employees are given under those statutes. The employer's interpretation has been specifically rejected.

> The PMTA does not seriously challenge the Board's finding that the work stoppage was caused by an abnormally dangerous condition of work. See *National Labor Relations Board* v. *Knight Morley Corp.*, 251 F. 2d 753 41 LRRM 2242 C.A. 6, (1957), cert. denied, 357 U.S. 957, 42 LRRM 2307 (1958). The Association argues, however, that the lockout was justified because its purpose was to compel the union to abandon a "quickie strike," and to compel the submission of the dispute to arbitration. *The short answer to this is that because the union's activity was found to come within the ambit of §502, it was a strike in violation of the contract but on the contrary was protected activity."*
>
> *Philadelphia Marine Trade Ass'n.* v. *NLRB*, 330 F. 2d. 492 (CA 31964), 55 LRRM 2889 (emphasis added).

Without even referring to Section 502, or reaching a finding of "abnormally dangerous conditions", the Supreme Court in *Washington Aluminum* affirmed the employees' right to protest the cold under Section 7 of the Act. The Court emphasized the fact that it was,

> "... (the) policy of the Act to protect the right of workers to act together to better their working conditions."
>
> *NLRB* v. *Washington Aluminum Co.*, 370 US 2 (1962), 50 LRRM 2237.

Section 502 provides additional or special protection for certain of those rights guaranteed by Section 7 of the Act. Under Section 7 employees have a right "to act together to better their working conditions". However, the Congress has said in Section 502 that where workers "act together to better . . . working conditions" which are "abnormally dangerous", they are given special protection. In short, the Congress has said in Section 502, that the right of workers to act together in "good faith" to better "abnormally dangerous conditions" cannot be bargained away by their collective bargaining agent. It *is* a right which is too basic to be bargained away.

CONCLUSION

For the reasons stated herein, petitioners seek to appear untimely as amici curiae on behalf of respondents, and request that this Honorable Court affirm the judgment below.

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September 26, 1973